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No. 922

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

HARRY J. STADIN,
Petitioner,

v.

UNION ELECTRIC COMPANY,

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

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To the United States Court of Appeals for the Eighth Circuit.

Petitioner Harry J. Stadin prays that a writ of certiorari issue to review the November 15, 1962 judgment of the aforesaid Court of Appeals entered in this case, No. 17,104 below.

OPINION BELOW

The opinion of the court below is recited in the Court of Appeals record ("R-A") p. 6, and in the separately submitted Appendix ("App.") p. 2. After its rendition it was modified, without order, in accordance with the first six suggested corrections listed in the petition for rehearing, pgs. 23-24, a certified copy and nine other copies of which are filed with this court. As so modified it is reported in **309 F 2d 912.**

JURISDICTION

The judgment of the court below was dated and entered November 15, 1962 (R-A 26, App. 22). A timely petition for rehearing filed December 5, 1962 (R-A 2) was denied December 26, 1962 (R-A 27). The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

I

Whether, as indicated in **50 Cal. L. R. 89, 91,** this court's decision in **Sam Fox Publishing Co. v U. S. (1960) 366 US 683, 694,** when coupled with its decision in **Hansberry v Lee (1940) 311 US 32, 42,** makes Rule 24 (a)(2)[1] a nullity where derivative intervention under Rule 23 (b) is sought by a stockholder in a private suit brought by his company for triple-damages under Section 4 of the Clayton Act.

II

Whether a minority common stockholder of a utility company may intervene derivatively under Rule 23 (b) in a triple-damage Clayton Act action brought by his company against certain convicted price-fixing corporations respecting price-fixed goods of one category they allegedly sold it, where the stockholder seeks intervention under Rule 24 (a)(2) in order to assert on behalf of his company additional claims against said price-fixing corporations respecting price-fixed goods of eleven other categories they allegedly sold it, when those eleven additional claims are not asserted by his company in the

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[1] All Rules referred to herein are those of the Federal Rules of Civil Procedure, Title 28 U.S.C.

main action, or in any other action, and where bad faith condonation is alleged and common questions of law and of fact have been found to exist.

III

Whether such a stockholder may so intervene in such Clayton Act action brought by his company against such incorporated price-fixers, where he seeks under Rule 24 (a)(2) to intervene derivatively under Rule 23 (b) so as to be able to bring in as additional defendants in that main action certain officers of those convicted price-fixing corporations who were themselves similarly convicted, but who were not made parties defendant by his company in its main action, bad faith condonation being alleged and common questions of law and of fact having been found to exist?

IV

Whether affidavits offered by a corporate plaintiff in the main action in support of that plaintiff's objection to a motion of one of its stockholders to intervene derivatively as an additional party plaintiff in the main action should be taken as true, or whether, absent sham or frivolity, the allegations made in movant's sworn pleadings should be taken as true, or whether, a hearing being held, neither the plaintiff's affidavits nor the movant's sworn pleadings can be taken as true, but instead only the evidence adduced at the hearing can be taken as the basis of a judgment on said motion.

V

Whether a motion filed under Rule 24 (a)(2) to intervene derivatively under Rule 23 (b), which was accompanied by a verified complaint filed under Rule 24 (c) and which was tried in the District Court on the basis of the record and testimony given at a hearing, may be re-tried

in the Court of Appeals, sua sponte, on the additional basis of an additional affidavit filed subsequent to that hearing in the District Court by an opponent to that motion, the District Court having granted that opponent leave to file, not an additional affidavit, but only an additional brief.

VI

Whether a transcript of proceedings had at a stockholders' meeting which is incorporated into an affidavit of the company's counsel filed in opposition to a stockholder's motion under Rule 24 (a)(2) to intervene derivatively under Rule 23 (b), but which transcript is not sworn to by said affiant or anyone else as containing a true recital of those proceedings, and which is objected to in the District Court by movant on the ground of hearsay, may be given any probative value by a Court of Appeals in passing on that District Court's denial of that motion to intervene.

STATUTE INVOLVED

The statute involved is Sec. 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C., 15. It is recited in App. 1.

STATEMENT

Basically, this case involves the right of a minority stockholder to intervene derivatively in a Clayton Act action brought by his company against convicted price-fixers, in order to bring in, over the objection of his company but not of the defendants, additional claims and additional parties defendant. That right has not been passed on by this court, nor by any court other than the court below. It poses an important sociological question, as well as a legal question. See petition for rehearing, "The Sociological Effect of this Court's Decision", pgs. 19-23.

The appeal below involved petitioner's motions to intervene in two cases. On May 17, 1962 the District Court denied petitioner's motion in the first case, but expressed the opinion under 28 U.S.C. 1292 (b) that its order "involves a controlling question of law upon which there is substantial ground for difference of opinion", and that immediate appeal was desirable. See District Court record ("R") 120, App. 23. On June 11, 1962 the court below denied petitioner's application for leave to appeal immediately under 28 U.S.C. 1292 (b), but did so without prejudice. (R-A 1).

Thereupon, on June 14, 1962, the day before the decision was rendered in **Rogers v American Can Co. (CA 3, June 15, 1962) 305 F 2d 297**, the case which the court below stated petitioner "presses upon us", contending that it "governs the present appeal" (R-A 23, 12, App. 19, 8), the District Court denied petitioner's motion to intervene in the second case. However, it entered final judgment against him in that case so that he might immediately appeal (R 121, App. 24). In that final judgment, entered under Rule 54 (b), the District Court consolidated the two cases for purpose of appeal.

On June 15, 1962 petitioner filed his notice of appeal in the two consolidated cases (R 123). The appeal was heard on both, and in both the District Court's denials of petitioner's motions to intervene were affirmed insofar as they pertained to intervention under Rule 24 (a)(2). Insofar as they concerned intervention under Rule 24 (b)(2) the appeals in both were dismissed (R-A 25, App. 21).

This petition involves only the review of the judgment of the court below in the first case, and only insofar as that judgment (R-A 26, App. 22) affirmed the District Court's denial of petitioner's motion to intervene under Rule 24 (a)(2).

On July 16, 1962 the court below granted petitioner leave to have his appeal heard on the original District Court record, without need to print (R-A 2, item 9). That original District Court record has been filed with this court as Vol. I of the record, along with a certified copy of the pertinent portions of the record of the court below, Vol. II.

The combined record herein shows (R 1, 137) that on December 26, 1961 Union Electric Co. ("Union"), the plaintiff in the main case and appellee below, brought an action in the U. S. District Court in St. Louis against Westinghouse Electric Corp. and General Electric Co., seeking triple-damages against those two corporations under Sec. 4 of the Clayton Act, 15 U.S.C. 15. The jurisdiction of the District Court was invoked under that section of that Act. Union claimed that said corporations had violated Sec. 1 of the Sherman Act, 15 U.S.C. 1, and that it had been injured by the unlawful overcharges they made in their sales to it of electrical equipment of one category, i.e. turbine-generators.

In its complaint Union alleged (R 6) that Westinghouse and General Electric had both pleaded guilty of conspiratorial price-fixing in their sales of turbine-generators to it, and that they, along with W. S. Ginn, C. J. Mauntel, W. C. Rowland and W. E. Saupe, who (R 2) "participated in the combination and conspiracy" to "fix" the price of said turbine-generators (R 3), were convicted in February, 1961 in criminal antitrust proceedings instituted against them by the federal government (R 6).

On February 20, 1962, before the main case was at issue, petitioner filed his motion to intervene derivatively as a party plaintiff therein, under Rule 23 (b). He sought intervention under Rule 24 (a)(2), and attached to his motion his verified complaint (R 20), filed in compliance with Rule 24 (c). In that complaint he incorporated by

reference all the allegations made by Union in its complaint (R 21).

Petitioner alleged (R 20) that he was a common stockholder of Union, and that as such he had an economic interest in the outcome of the main action. He made (R 20) all the formal allegations required by Rule 23 (b) and specifically alleged (R 24) that Union's directors had refused to cause it to enforce rights which might properly be asserted by it. He alleged with particularity (R 20-21) the efforts he had made to secure from Union's directors and stockholders the action he desired they take, and the reasons for his failure to obtain such action from them. He specifically alleged (R 21) that at Union's April 20, 1961 stockholders' meeting certain stockholders and certain members of Union's board "spoke out against" the adoption of a stockholder resolution he there presented, which called on the directors to cause Union to pursue "all its legal rights" against "any of those of its electrical equipment suppliers who were recently convicted", and that "all" the members of Union's board voted against his resolution, which was defeated.

In his motion (R 19) petitioner alleged that representation of his interest by Union "is or may be inadequate"; that he "is or may be bound by a judgment in the main action"; and that his claims and Union's "have a question of law and fact in common". He pleaded those same allegations in his complaint (R 25). As to his allegations of common questions, on April 20, 1962 the District Court found, as recited in its May 8, 1962 pre-trial conference order (R 113), that his proposed action and Union's main action "involve common questions of law and of fact" (R 117). See also its order of June 14, 1962 (R 121, App. 24).

In his complaint (R 22) petitioner alleged that apart from their sales to Union of price-fixed turbine-generators, which sales formed the basis of Union's claims against

defendants in the main action, and apart from their sales to it of seven additional categories of price-fixed equipment, which sales formed the basis of seven additional claims which Union thereafter, on January 31, 1962 (R. 10, 142), filed against them in said District Court, defendants sold Union price-fixed equipment embracing eleven other named categories, respecting which they had also been convicted.

Petitioner then alleged (R 22) that "Union did not bring suit" respecting any of those eleven additional categories of equipment, and (R 21) that as to those categories its directors and majority stockholders "adopted the policy of condonement of the aforesaid price-fixing". He alleged (R 21) that he then advised Union's president, J. W. McAfee, on April 24, 1961, that "unless the company changed its policy, and undertook to pursue its legal rights against said price-fixers", petitioner himself would "seek legal remedy on behalf of the company . . . in a derivative stockholder action or actions". To date Union has not brought any Clayton Act actions respecting any of said eleven additional categories of equipment. Nor has it brought any such action against W. S. Ginn or C. L. Mauntel or W. C. Rowland or W. E. Sampe.

On February 26, 1962 the District Court granted Union leave to file a "brief and documentary evidence" in opposition to petitioner's motion to intervene (R 137). On March 28, 1962 it filed such brief, to which it attached three affidavits (R 61, 66 and 71). On April 5, 1962 (R 137) petitioner filed his answering brief, together with his answering affidavit (R 94-99). His motion was heard on April 6, 1962 (R 137). Petitioner testified that the allegations contained in his verified complaint and in his answering affidavit were true (R 127). He was not cross-examined and no other testimony was offered (R 127). Union then requested and was granted 5 days in which to

submit an additional brief (R 137, App. 26). Petitioner was granted 5 days in which to reply (R 137, App. 26).

Instead of filing an additional brief, on April 10, 1962 (R 137, App. 26) Union filed an additional affidavit (R 103, App. 26), though insofar as the introduction of evidence was concerned petitioner's motion had been "heard, argued & submitted" at the close of the April 6, 1962 hearing (R 137, App. 26). The affidavit was that of John A. Woodbridge, Union's chief counsel in the main action (R 18). To it was attached its Exhibit A (R 104-111), which consisted of alleged "complete and accurate excerpts from the transcript of the Annual Meeting of Stockholders of Union Electric Company held on April 20, 1961". The transcript from which Exhibit A was taken was not otherwise identified, nor did the affidavit recite that the transcript from which the "excerpts" were taken truly recited what was said at the meeting. Instead, it simply said that the "excerpts" comprising Exhibit A "are hereby made a part of this affidavit as though fully set out herein" (R 103, App. 26).

On April 16, 1962 (R 138) petitioner filed his sworn objection to that affidavit, on the ground of hearsay (R 112). He stated that it incorporated "recitals purporting to have been uttered on April 20, 1961 by J. W. McAfee, Jens O. Larsen and Thomas J. Connelly" which were not "sworn to by them" as having been uttered. The District Court did not pass on that evidentiary question. The evidence had already been taken as submitted, as aforesaid (R 137, App. 26).

The basis of the judgment of the court below is succinctly stated in the "Synopsis of Recent Federal Cases" published in the January 22, 1963 South Western Reporter Second Series Advance Sheets, **362 SW 2d No. 4, p. XXXVI**, wherein it is stated that the court below

"held that minority stockholder was not entitled to intervention as a matter of right on the basis of possible inadequacy of representation where there was a showing merely of difference of opinion between shareholder and plaintiff as to how litigation should be conducted, and where there was no showing of failure of plaintiff in fulfillment of its duty to its shareholders".

That was the showing made by Union's affidavits, which the court below took as true. But those affidavits controverted petitioner's motion and verified complaint and answering affidavit, and all the testimony that was offered at the hearing, in the following respects:

a. Petitioner's complaint alleges (R 24) that Union's directors "refused to cause the company" to sue on the eleven categories of equipment; that they "expressed their intention not to cause the company to do so"; that they "condoned the sale of such equipment items to Union at price-fixed prices"; and that Union "did not bring suit thereon" (R 22), though it sustained damages "running into the millions of dollars" (R 23). In its first affidavit Union's executive vice-president A. H. Schettler stated (R 63) that "The management of Union Electric has not refused to bring suit", but rather was "investigating" the matter. Over a year had passed since petitioner first requested that suit be brought (R 20).

b. Petitioner's complaint alleges (R 23) that on February 9, 1962 Union refused to divulge to petitioner, "or permit him to ascertain from examination of its books and records, contrary to R. S. Mo. 1959, Sec. 351.215, the amounts it expended during the conspiracy period" in purchasing the aforesaid eleven categories of equipment, and that on that date it "refused to divulge to intervenor the names of the various suppliers from whom it purchased said equipment items". In his affidavit Mr.

Schettler stated (R 63) that Union "has never refused to permit movant to examine its records of purchases" and (R 64) that it had "advised" petitioner on several occasions that its "original records" were "available" to him. He did not say when those alleged advices were given. In his affidavit of April 5, 1962 petitioner alleged (R 98) that they were given after his motion to intervene was served and filed on February 20, 1962.

c. Petitioner's complaint alleges (R 21) that "all" of the members of Union's board, of which Mr. Woodbridge was one, voted against his resolution, and that Mr. Woodbridge "voted against bringing such suit". It further alleges (R 23) that Mr. Woodbridge "voted against bringing the main action". In his first affidavit Mr. Woodbridge stated (R 69) that though he "voted against" petitioner's resolution "for the reason that it was not a proper subject for action by stockholders", since "under Missouri law . . . the decision whether or not to litigate is in the directors" (R 67), "he never voted against bringing such actions" (R 69).

d. By incorporating into his verified complaint, by reference (R 21), "all" of the allegations made by Union in its complaint, petitioner alleged, as did Union (R 2), that "W. S. Ginn, C. I. Mauntel, W. C. Rowland and W. E. Sampe participated in the combination and conspiracy hereafter alleged", i.e. the turbine-generator combination and conspiracy. They were expressly not named by Union "as defendants", but were named as "co-conspirators" (R 2) who had continuously agreed to "fix" the prices of the turbine-generators sold to Union (R 3), for which acts they were indicted and sentenced (R 6). Thus petitioner alleged that Union did not make them parties defendant in its main action. It refused to. As petitioner alleged (R 24), Union's directors refused to cause the company to "bring any such suits, against defendants or any oth-

ers", and (R 25) that "such condonation and refusal on the part of Union's directors was not done in good faith, amounted to an unreasonable, capricious and arbitrary exercise of business judgment, and constituted a breach of trust on the part of said directors". That last allegation covered the directors' refusal to sue on the eleven additional categories as well. Petitioner alleged that they "condoned the sale of such equipment items to Union at price-fixed prices" (R 24).

The court below found those allegations of "condonation and bad faith" to be "only the pleader's conclusions" (R-A 17, App. 13). It relied on Mr. Schettler's affidavit, in which he alleged (R 64) that Union's management "is in no way connected with the defendants in these causes of action or with any other electrical equipment suppliers named in the indictments"; that Union is "not in collusion with any of the defendants or the other electrical equipment suppliers concerning any decision whether or not to bring suit against them"; and (R 61) that "It is not now, nor has it ever been, the policy of Union Electric to condone any price-fixing by electrical equipment suppliers".

e. Petitioner alleged in his motion (R 19), and in his complaint (R 25), that his representation by Union "is or may be inadequate". He alleged (R 25) that Mr. Woodbridge, "Union's principal attorney in the main action", was "not on friendly terms" with petitioner, having denied him the corporate record inspection privilege accorded all stockholders by R. S. Mo. 1959, Sec. 351.215, as aforesaid, and having characterized certain short-swing profit charges petitioner brought against him, in proceedings before the SEC, as being "malicious". In his affidavit of April 5, 1962 (R 98) petitioner alleged the converse of that "not on friendly terms" allegation, i.e. that "I am not on friendly terms with Mr. Woodbridge", and that under **U. S. v C. M. Lane Lifeboat Co. (ED NY 1938) 25 F Supp**

410, 411, "My feeling about him, not his about me, is what counts". Petitioner made that converse allegation because Mr. Woodbridge had (R 68) denied that he was "on unfriendly terms" with petitioner, and alleged that he "has never stated that movant in these cases, Harry J. Stadin, had made malicious charges".

f. In his affidavit of April 5, 1962 petitioner alleged (R 98) that "Mr. Woodbridge's personal interests are contrary to mine. He cannot adequately represent me". Petitioner stated those divergencies of personal interest. Apart from the aforesaid charges he alleged (R 96) he had made before the SEC respecting Mr. Woodbridge's "unlawful short-swing arbitrage profits", which charges petitioner alleged Mr. Woodbridge had characterized to the SEC as "malicious" (R 25), petitioner alleged (R 96) the part Mr. Woodbridge had played before the SEC, over petitioner's opposition, respecting the exemption of Union from the Holding Company Act, and (R 97) the part he had played before the SEC, over petitioner's opposition, respecting the issuance to himself of options to buy 962 shares of Union's common stock at a discount. The court below treated those allegations as though immaterial, and on the basis of Mr. Woodbridge's affidavit (R 67) found that petitioner had made no showing of the possible inadequacy of Mr. Woodbridge's representation of his interests in the main action (R-A 18, App. 14).

g. In his April 5, 1962 affidavit petitioner alleged (R 94-95) that at Union's April 20, 1961 stockholders' meeting stockholder Jens O. Larsen stated that bringing suit against the equipment suppliers might amount to "wasting quarters to recover nickles"; that stockholder Thomas J. Connelly stated that bringing suit against them would be "just money thrown away", since "none" of them "made any exorbitant profits"; and that

> "Mr. J. W. McAfee, a director and president of Union, concurred in those statements. He said that

suits for triple damages might cut into research and development programs of those suppliers to an extent that would be 'detrimental' to the industry of which Union was a member".

Instead of cross-examining petitioner, who at the hearing (R 127) testified to the truth of that allegation, or instead of offering contradictory testimony thereat, or a sworn transcript of the proceedings at the April 20, 1961 stockholders' meeting, Mr. Woodbridge, four days thereafter (R 138), filed his additional affidavit of April 10, 1962 (R 103, App. 26), as aforesaid, incorporating therein his Exhibit A (R 104-111). That Exhibit A, the unsworn "excerpts", shows that instead of concurring with Mr. Larsen, as petitioner had alleged (R 95), Mr. McAfee simply said that he would "bear in mind" Mr. Larsen's injunctive (R 110), and that in his reply to Mr. Connelly all Mr. McAfee said was "Thank you very much" (R 111). Relying on that, the court below found (R-A 24, App. 20) that Mr. McAfee's replies "are only acknowledgments of the shareholders' comments and a statement of appreciation for them".

h. That action of Mr. Woodbridge shows his professional character. Mr. Schettler stated in his affidavit (R 64) that Union was "well satisfied with its legal representation in these law suits". In reply petitioner, a lawyer (R 94), alleged (R 98): "I am not satisfied with Mr. Woodbridge". The court below found (R-A 18, App. 14) that petitioner's dissatisfaction with Mr. Woodbridge "lies largely in the area of asserted disagreement between lawyers as to how litigation should be conducted". Petitioner was not only interested in **how** the litigation should be conducted. He was also interested in **what** litigation should be conducted, as the prayer of his complaint shows (R 26). The court below found that Mr. Woodbridge's actions and non-actions constituted a "mere difference of

opinion among attorneys", and did not constitute "inadequate representation within the meaning of the Rule" (R-A 18, App. 14). Though petitioner suggested in his petition for rehearing, p. 19, that the court below had overlooked the fact that by his attempted subterfuge Mr. Woodbridge had "disqualified himself" from adequately representing petitioner, the court below did not change its ruling.

i. As to petitioner's allegation (R 95) of Mr. McAfee's statement respecting the detriment the filing of triple-damage suits would occasion the industry of which Union was a member, the court below found (R-A 24, App. 20) that Mr. McAfee "named it as a worrisome fact and nothing more". Mr. Woodbridge's Exhibit A, on which the court below relied, quotes Mr. McAfee as having said "It is a very considerable worry" (R 108).

j. In its opinion (R-A 12, App. 8) the court below, referring to Mr. Woodbridge's Exhibit A, stated that in objection thereto petitioner asserted "that the statements made at the meeting were not under oath and were hearsay". The court below misinterpreted petitioner's objection. What petitioner asserted (R 112) was that since Exhibit A was not sworn to as truly reflecting what was said at the meeting, the "recitals" contained therein "are not admissible in this case, being hearsay". That oversight of the court below was called to its attention in petitioner's petition for rehearing, "The Hearsay Point", pgs. 16-19.

k. In his complaint petitioner alleged (R 21) that at the April 20, 1961 meeting of Union's directors and stockholders "all" the directors (which included Mr. McAfee) "adopted the policy of condonement of the aforesaid price fixing", and as regards the eleven categories (R 24) "condoned the sale of such equipment items to Union at price-fixed prices". As hereinbefore stated, petitioner alleged

(R 95) that at that meeting Mr. McAfee stated that for Union to bring triple-damage suits against its suppliers "would be 'detrimental' to the industry of which Union was a member". In contrast, in his affidavit Mr. Schettler stated (R 61) that "It is not now, nor has it ever been, the policy of Union Electric to condone any price-fixing", and (R 64) that "Management does not represent any interest adverse to movant's interest as a stockholder". He did not state that petitioner's interest and the industry's interest were the same. Nor did he state that Union had not condoned. He simply stated that it was not its policy to do so.

1. In furtherance of the interest of Union's management, and that of the industry of which it is a member, Union, led by Mr. Woodbridge, opposed petitioner's application (R-A 1) for leave to appeal under 28 U.S.C. 1292 (b). At the hearing on that application (R-A 1), and in its brief on the merits of petitioner's appeal (R-A 3, 4 and 5), Union contended that petitioner's complaint, though he had sworn to it (R 26) and had testified that it was true (R 127), was "sham". Union opposed petitioner's motion to hear the appeal on the original District Court record, and urged that he be required to print (R-A 2, item 8). It was the only party, below or in the District Court, that opposed petitioner's intervention.

Furthermore, as "adequately" representing petitioner and Union and the industry ever since it filed the main case, Union has been content to let the 4 year statute of limitations provided for in 15 U.S.C. 15b and 16 (b) run against it as regards its turbine-generator claims against W. S. Ginn, C. I. Mauntel, W. C. Rowland and W. E. Saupe, and likewise as regards its claims against Westinghouse and General Electric respecting the eleven other categories of price-fixed equipment that Union admitted in its second and third affidavits those suppliers had sold it (R 62, 73). It is still "investigating" those claims.

m. Petitioner alleged (R 19, 20) that he is and was a common stockholder of Union. With the privity that such relationship establishes in mind, and realizing that the Missouri Public Service Commission, acting on behalf of Union's consumers, might claim all or part of the proceeds of any judgment that Union might receive, he alleged (R 19, 25) that he "is or may be bound by a judgment in the main action". He also alleged (R 20) that his proposed intervening action "constitutes a class intervention", and (R 25) that he sought intervention on behalf of himself and all "similarly situated holders of Union's common stock". He further alleged (R 19, 25) that his claims and Union's claims in the main action "have questions of law and fact in common". He made that allegation because Union's directors are fiduciaries.

Though in his affidavit (R 61) Mr. Schettler admitted that petitioner "owns 47 shares of the common stock" of Union, Union nonetheless contended (R 43) that petitioner would not be bound by a judgment in the main action. The court below, omitting all mention of the class nature of petitioner's intervention, and the fact that Union's directors were fiduciaries, not only found him not inadequately represented in the main action (R-A 16-20, App. 12-16); it also found (R-A 14, App. 10) that he "could be regarded as being satisfied with Union's representation there". Despite that finding it further found that he would not be bound by a judgment therein since the res judicata test applied by this court in **Sam Fox** would not be met (R-A 15-16, App. 11-12).

In contrast to the District Court's finding of common questions of law and of fact (R 117), the court below found (R-A 15, App. 11) that the issues presented by petitioner's claims differed from those presented by Union's in that on the face of petitioner's pleadings "the issues are several in number and are varied as to factual background". Hence the court below held (R-A 15, App. 11):

"This casts doubt on any claim that a judgment in one category will possibly operate with binding effect in another". It found that petitioner, whom it recognized as a common stockholder of Union (R-A 8, App. 4), would not be bound by a judgment in the main action, though adequately represented therein by Union.

REASONS FOR GRANTING THE WRIT

1. In interpreting Rule 24 (a)(2) the court below decided a federal question in a way that is in conflict with applicable decisions of this court. It found that petitioner, a stockholder of the plaintiff in the main action, was adequately represented therein, but would nonetheless not be bound by a judgment therein. In **Sam Fox Publishing Co. v U. S. (1961) 366 US 683, 689,** this court held that the applicant for intervention there was not adequately represented, and hence, l.c. 694, could not be legally bound within the meaning of the Rule. In **Hansberry v Lee (1940) 311 US 32, 42,** it held that a judgment in a class action is legally binding on those adequately represented therein. Hence, unless **Sam Fox** be distinguished in its interpretation of the word "bound" as used in Rule 24 (a)(2), it and **Hansberry**, taken together, render Rule 24 (a)(2) a nullity, at least in class and fiduciary suits. See **50 Cal. L. R. 89, 91.** For there cannot be, as in the instant case, both a holding that the applicant for intervention is adequately represented by his company and that he would not be bound by a judgment in the main case in the res judicata sense.

2. The decision of the court below is in apparent conflict with the decision of the U. S. Court of Appeals for the Third Circuit in **Rogers v American Can Co. (1962) 305 F 2d 297.** Though the court below distinguished **Rogers** on the ground (R-A 24, App. 20) that there "plaintiff's charge was that his corporation was a captive through

conspiratorial activities of its controlling directors", while here petitioner charged "no comparable situation", legally plaintiff's directors here are in the same boat with the conspiring directors in **Rogers**.

Rogers was a class suit (l.c. 298), as is the instant case (R 20, 25). In **Rogers** it was the defendant directors who were the alleged wrongdoers. Here it is the plaintiff's directors who are charged with specified feasance and nonfeasance "not done in good faith" which "amounted to an unreasonable, capricious and arbitrary exercise of business judgment, and constituted a breach of trust" (R 25). Factually, the situation here is not comparable to that in **Rogers**, but legally it is. In view of petitioner's allegations respecting their "policy of condonement" (R 21), *Union is just as much a "captive" of* its directors as Metal & Thermit Corp., the injured company in **Rogers**, was the "captive" of its.

3. Though the court below (R-A 21, App. 17) assumed an affirmative answer thereto for the purpose of passing on the instant case, the procedural question presented here, i.e. whether a derivative secondary action under Rule 23 (b) may properly be instituted through the device of intervention under Rule 24 (a)(2), has not been, but should be, settled by this court. It is an important question of federal law the answer to which is plainly in the public interest, particularly where, as here, the intervention is sought to enable a stockholder of a public utility to bring in individual co-conspirators as additional defendants and likewise recover derivatively from the corporate defendants additional damages based on additional claims brought under Sec. 4 of the Clayton Act. See John Herling, **"The Great Price Conspiracy" (Robert B. Luce, Inc., 1962) pgs. VII, 13, 74, 81, 85, 179, 259, 260, 305, 309 and 319**, and **20 A.B.A. Antitrust Section, pgs. 29, 46, 47, 78 and 93.**

4. On the question of whether, for the purpose of passing on Union's contention in its brief (R 60) that petitioner's motion to intervene should be denied (Union filed no motion to dismiss or motion for summary judgment), the allegations made by petitioner in his verified complaint (R 20) and in his supporting affidavit (R 94) should or should not be taken as true, the decision of the court below is demonstrably in conflict with the decision of this court in **Sam Fox**, supra, l.c. **691**, the decision of the U. S. Court of Appeals for the Seventh Circuit in **Clark v Sandusky (1953) 205 F 2d 915, 918**, and the decision of the U. S. Court of Appeals for the Third Circuit in **Rogers**, supra. Though the pleading there was not a Rule 24 (c) pleading, since intervention was not sought, in **Rogers** Judge Forman held, l.c. **318**, that for the purpose of passing on defendants' motions for summary judgment and to dismiss, the allegations in plaintiff's amended complaint "are to be taken as true". In **Sam Fox** this court held, l.c. **691**, that the record should be taken "at face value".

In the instant case Judge Blackmun did not take the allegations of petitioner's pleadings at face value. Contrary to his statement in **Kozak v Wells (CA 8, 1962) 278 F 2d 104, 109** (wherein a different panel of the court below held that "absent sham and frivolity, we accept the allegations of those pleadings as true") the panel of the court below that decided the instant case actually considered affidavits in opposition that controverted material facts alleged by petitioner, and in addition an affidavit based on hearsay that petitioner had objected to as such (though, speaking through the same Judge Blackmun, it referred to the decision in **Kozak** and stated (R-A 13, App. 9) that it could consider only "well pleaded" affidavits in opposition that supplied "uncontroverted and material facts"). In that respect the panel that decided the instant case did not follow **Kozak**, and did not even follow its own

pronouncement of the law in this case. Though it said it was not engaging in "trial by affidavit", that is exactly what it did.

5. Whether to take as true the pleadings of an applicant for intervention, where that applicant seeks to intervene as a party plaintiff and is opposed by the plaintiff in the main action, or to take that plaintiff's opposing affidavits as true, involves, as the District Court expressed it (R 120, App. 23), "a controlling question of law upon which there is substantial ground for difference of opinion". In the instant case the court below took Union's opposing affidavits as true. In **Kozak** it held that, absent sham or frivolity, the pleadings of the applicant for intervention should be taken as true. This court held similarly in **Sam Fox**. But in the instant case there was a hearing (R 126). That presents a different situation, and poses an important question which has not been, but should be, settled by this court. It is suggested that in such a situation, where the plaintiff in the main case opposes intervention by a would-be plaintiff, neither plaintiff's affidavits nor the would-be plaintiff's pleadings and affidavits should be taken as true, but that instead the outcome should be judged on the basis of the evidence adduced at the hearing.

6. On the question of the test to be applied respecting the requirement of Rule 24 (a)(2) that the applicant for intervention "is or may be bound" by a judgment in the main action, the decision of the court below is in demonstrable conflict with the decision of the U. S. Court of Appeals for the Second Circuit in **International Mortgage & Investment Corp. v Von Clemm (1962) 301 F 2d 857**, and the decision of the U. S. Court of Appeals for the District of Columbia in **Independent Refiners Ass'n. et al v Standard Oil Co. (N. J.) Case No. 16,725 (1962) 304 F 2d 387**. In each of those cases the court refused to

apply the res judicata test, and distinguished the decision of this court in **Sam Fox**.

In the instant case the court below (R-A 16, App. 12) refused to distinguish **Sam Fox**. Even though petitioner, as a stockholder of Union, is in privity with the plaintiff in the main case, and even though the District Court held (R 117) that common questions of law and of fact are involved, the court below held that petitioner had not sufficiently shown that he would be legally bound by a judgment in the main action, and (R-A 16, App. 12) that "The presence or possibility of difficulty, even great difficulty, is not enough". If a difficulty is great enough it amounts to impossibility, and that is just as prohibitory as res judicata.

7. On the question of the test that should be applied to the requirement of Rule 24 (a)(2) that the representation by existing parties of the interest of an applicant for intervention "is or may be inadequate", the decision of the court below is in demonstrable conflict with the decisions of other U. S. Courts of Appeal, in **International Mortgage** and **Independent Refiners**, supra.

If the facts show that the applicant, with good reason, is not on friendly terms with the attorney who in effect is representing his interest, which was held in **U. S. v C. M. Lane Lifeboat Co. (ED NY 1938) 25 F Supp 410, 411**, to be sufficient (and **Lifeboat** was followed by the court below in **Kozak**, l.c. 112, though distinguished in the instant case), and if they further show the aversive character and untoward quality of that attorney's representation of the interest of a stockholding applicant whose company, the plaintiff in the main action, is opposing his intervention as a party plaintiff, and that there is "sound reason for belief" that that company "may fail adequately to protect" the applicant's interest, since it has shown "a conspicuous disinterest in asserting the rights" of that

company, which was the test applied in **International Mortgage, l.c. 860, 861**, then it is believed that the test is met. Though petitioner showed it here, "it is not necessary to show that such parties or their counsel are not acting in good faith, or are not properly discharging their duties", as stated in **Independent Refiners, l.c. 393**. An attorney who serves the conflicting interests of a company and the industry of which it is a member cannot adequately represent the interest of a stockholder of that company who is seeking derivative intervention in a Clayton Act suit.

8. The decision of the court below so far departs from the usual course of judicial proceedings as to call for the exercise of this court's power of supervision. The court below not only entertained, but based its decision on, an incompetent transcript of a stockholders' meeting that was not shown as truly reciting what was said at that meeting, and that was objected to as hearsay. It did that even though that incompetent transcript was not filed in the District Court at or before the hearing, but after the hearing, and without leave as such. Mr. Woodbridge's second affidavit (R 103, App. 26), which incorporated recitals from that unsworn transcript, was not based on personal knowledge thereof as required by Rule 56 (e), and hence should have been treated as provided in Rule 56 (g).

9. There are special and important reasons for the review of this case on writ of certiorari. According to Feinberg, J., in **Atlantic City Electric Co. v General Electric Co. (SD NY, July 11, 1962) 207 F Supp 613, 614**, "roughly 1800" triple-damage Clayton Act suits that arose out of the February, 1961 convictions of certain members of the electrical equipment industry "are now pending". According to the **Co-ordinating Committee for Multiple Litigation of the United States District Courts** quite a number

of those cases, reported and unreported, raise important questions respecting class actions and intervention which not only have not been settled by this court, but which are new in the juridical sense. See Milton Handler, **"Some Unresolved Problems of Antitrust" (March 10, 1962) 62 CLR 930, 957.** In one of those recent intervention cases, **Philadelphia Electric Co. v Westinghouse Electric Corp. (CA 3, September 26, 1962) 308 F. 2d 856,** McLaughlin, J., dissented. In his dissent, **l.c. 861,** he referred to the "important issues of law and fact which are involved".

The instant case provides an opportunity for this court to settle many of those class intervention questions presently being raised in the District Courts. For example, the court below held (R-A 23, App. 19) that petitioner had to show a "positive" refusal on the part of Union to sue. That holding is believed to be plainly wrong. A showing of "positive" refusal is not required by Rule 23 (b). A corporation's non-compliance, for an unreasonable length of time, with a demand made by one of its stockholders that it sue for triple-damages under the Clayton Act would appear to satisfy the requirement of Rule 23 (b). As the court below, speaking through another panel, said in **Kansas City, Missouri v Federal Pacific Electric Co. (CA 8, November 6, 1962) 310 F 2d 271, 284,** when it amended the antitrust law Congress was "concerned with efficient enforcement of the Clayton Act".

Another example is shown by the statement in the opinion below (R-A 25, App. 21), quoting out of context a dicta of Mr. Justice Jackson of this court in a dissent, that "it is generally bad policy to encumber any case with unnecessary intervenors". Unnecessary or not, it is believed that Rule 24 (a) accords, as its heading states, "Intervention of Right", regardless of policy. As stated in **Philadelphia Electric Co.**, supra, l.c. 859, if its pre-

requisites are met "That rule confers upon an interested person an unqualified right to intervene". Or as stated by Hays, J., in his separate opinion in **International Mortgage**, supra, l.c. 865, Rule 24 (a)(2) requires that applications to intervene thereunder be granted whenever the judgment in the main case may permanently foreclose the applicant from assertion of his rights, "regardless of considerations of trial convenience, introduction of extraneous issues, confusion and delay". See also **Kozak**, supra, l.c. 108, where the court below, speaking through another panel, listed three, and only three, conditions for intervention under Rule 24 (a)(2).

10. This case cries out for review. We have antitrust laws because the American people have chosen competition as their economic way of life. **20 A.B.A. Antitrust Section, p. 29.** To assure competition those laws give subsidies to injured private parties who enforce them. **Id., p. 93.** Nonetheless, antitrust law violations are increasing. See **"The Great Price Conspiracy"**, supra. That is because there are men in the upper reaches of our large manufacturers who are motivated, not by a desire to compete effectively, but to climb their corporate ladders to the top. See petition for rehearing herein, p. 21. Union Electric Co., which itself stands charged by the National Rural Electric Cooperative Association with overcharging its customers more than $23,000,000 between 1956 and 1960, cannot condone its suppliers' overcharges. They are proscribed by law.

CONCLUSION

This petition should be granted.

Respectfully submitted,

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